# INDEX


| | Page |
|---|---|
| Statement | 1 |
| Argument | 6 |
| Conclusion | 16 |


## CITATIONS


Cases:

*Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137 — 7, 15

*Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519 — 14

*Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564, certiorari denied, 375 U.S. 834 — 11, 12

*Minnesota* v. *Northern Securities Co.*, 194 U.S. 48 — 11

*New York City* v. *New York Telephone Co.*, 261 U.S. 312 — 12

*Paine Lumber Co.* v. *Neal*, 244 U.S. 459 — 11

*People of the State of California* v. *United States*, 180 F. 2d 596 — 10

*Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683 — 7, 8, 9, 15

*Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19 — 7, 12, 13, 14

*United States* v. *ASCAP*, 11 F.R.D. 511 — 10

*United States* v. *ASCAP*, 341 F. 2d 1003 — 7




774-770—65——1

Cases—Continued

| | Page |
|---|---|
| *United States* v. *Bearing Distributors Co.*, 18 F.R.D. 228 | 10, 11 |
| *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73 | 10, 11 |
| *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 | 2 |
| *United States* v. *Northern Securities Co.*, 128 Fed. 808 | 10 |
| *Westinghouse Broadcasting Company* v. *United States*, 364 U.S. 518 | 7, 15 |
| *Wometco Television & Theatre Co.* v. *United States*, 355 U.S. 40 | 7 |

Statutes:

| | |
|---|---|
| Clayton Act, 15 U.S.C. 12, *et seq*.: | |
| Section 7 | 2 |
| Section 15 | 11 |
| Sherman Act, Section 4, 15 U.S.C. 4 | 11 |

Miscellaneous:

| | |
|---|---|
| Federal Rules of Civil Procedure: | |
| Rule 24 | 10 |
| Rule 24(a) | 7 |
| Rule 24(a)(2) | 7, 8, 9, 11 |
| Rule 24(a)(3) | 6, 11, 12, 13 |
| Rule 24(b) | 7 |
| Rule 24(b)(2) | 14 |
| 4 Moore's *Federal Practice* ¶24.09 [2] | 12 |

# In the Supreme Court of the United States

OCTOBER TERM, 1964

---

No. 1090

CASCADE NATURAL GAS CORPORATION, APPELLANT

*v.*

EL PASO NATURAL GAS COMPANY, ET AL.

---

No. 1101

PEOPLE OF THE STATE OF CALIFORNIA, APPELLANT

*v.*

UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY AND PACIFIC NORTHWEST PIPELINE CORPORATION

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH*

---

## MOTION OF THE UNITED STATES TO DISMISS

---

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the United States moves that the appeal in each of these cases be dismissed.

### STATEMENT

These are direct appeals from an order of the district court (Casc. J.S. 10–11)[1] denying intervention in

[1] "Casc. J.S." as used herein refers to the jurisdictional statement filed by Cascade Natural Gas Corporation in No. 1090; "Cal. J.S." refers to the jurisdictional statement of the People of the State of California filed in No. 1101.

the antitrust divestiture proceedings being conducted pursuant to the decision and mandate of this Court in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651. This Court ruled in that case that the acquisition by El Paso Natural Gas Company ("El Paso"), a producer and supplier of natural gas, of its only competitor, Pacific Northwest Pipeline Corporation ("Pacific Northwest"), violated Section 7 of the Clayton Act (15 U.S.C. 18). Divestiture of Pacific Northwest was ordered and the proceeding was remanded to the district court for framing of the decree. No final decree of divestiture has as yet been entered.

Appellant Cascade Natural Gas Corporation ("Cascade") is engaged in the retail distribution of natural gas in interstate commerce in the States of Washington and Oregon (Case. J.S. 4). Pacific Northwest formerly supplied Cascade all of its natural gas requirements, and after the merger El Paso became its sole supplier (*ibid.*). Cascade sought to intervene as of right in the divestiture proceedings solely on the basis of its expressed fear that the so-called "New Company" to be established in the Pacific Northwestern section of the country as a result of divestiture might not be able to supply Cascade's gas requirements as satisfactorily as the old merged company (see Cascade's "Memorandum * * * in Support of Application for Leave to Intervene," pp. 5–8, 17–22).

The State of California ("California"), represented by "special counsel," sought to intervene for the general purpose of assuring that the district court "direct the El Paso Natural Gas Company to so dispose of its equitable ownership of the Pacific Northwest Pipe-

line Corporation so as to render Pacific Northwest Pipeline Company independent and ultimately competitive" ("Statement in Support of Application for Leave to Intervene," p. 2, dated November 19, 1964).[2] The government opposed intervention.

Appellants' applications for leave to intervene, and similar pleadings in intervention on behalf of 10 other natural gas distributing companies, a corporation seeking to purchase the assets to be transferred, and the public utilities commissions of 7 States (all of which were denied; see p. 5, *infra*) (Casc. J.S. 13), were filed shortly after El Paso submitted to the district court its first proposed plan of divestiture (Def. Ex. A, 1; see also Transcript, October 19, pp. 11–15, 17–44, 53–65). The plan contemplated that El Paso would transfer to the New Company all the assets it had acquired from Pacific Northwest, together with additions and betterments thereto, and certain additional properties belonging to El Paso which it had not acquired from Pacific Northwest. In exchange for these assets, El Paso would receive all of the stock of the New Company, which it proposed to distribute to its own common shareholders. The government objected to this latter feature, urging that the primary purpose of divestiture was to reconstitute

[2] The Public Utilities Commission of the State of California, represented by different counsel, moved separately to intervene for the specific purpose of representing the interests of "California natural gas distributing utilities and ultimate ratepayers who purchase gas from these utilities" ("Motion of the Public Utilities Commission of the State of California for Leave to Intervene," p. 2, November 16, 1964). That agency has neither appealed from the order denying its motion nor joined in the appeal of the State in No. 1101.

the acquired company as an independent, viable competitor, and that this objective could not be accomplished if control of the new pipeline were placed in the hands of El Paso's shareholders as proposed (see "Plaintiff's Brief After Divestiture Hearings," pp. 2–12).

In the government's view, moreover, El Paso's initial proposed decree did not adequately accommodate the interrelated responsibilities of the district court to accomplish divestiture in accordance with this Court's decision, and of the Federal Power Commission to certificate the divested pipeline under the public interest standards of the Natural Gas Act. Accordingly, the Federal Power Commission, which did not seek leave to intervene as a party, was granted permission by the district court to participate in the divestiture proceedings as *amicus curiae* (Transcript, October 19, 1964, pp. 46, 72–75; "Statement of the Federal Power Commission, *Amicus Curiae*," October 9, 1964). The Commission urged that the final decree (1) require the New Company to file an application at the earliest practicable date requesting, *inter alia*, the issuance of a certificate of public convenience and necessity authorizing the New Company to acquire, own and operate the properties to be received from El Paso; and (2) provide that, in the event the Federal Power Commission imposes any condition upon any certificate issued by it to the New Company following the district court's order of divestiture, either the United States or El Paso may apply to the court to determine whether such conditions are compatible with the antitrust relief ordered and, further, that the

court may direct El Paso and the New Company to take such further action as may be appropriate with respect to modifying their application for a certificate of public convenience and necessity from the Commission (*ibid.*; "Supplemental Statement of the Federal Power Commission, *Amicus Curiae*," February 23, 1965).

The most recent modified plan of divestiture, the result of negotiations between the Department of Justice and El Paso, substantially meets the government's original objections to El Paso's first proposed decree. It also incorporates provisions deemed adequate to permit the district court and the Federal Power Commission to discharge their respective responsibilities under the antitrust laws and the Natural Gas Act. Thus, each of the twenty applications or motions for leave to intervene (including those of the appellants) are directed to a proposed decree of which most of the substantive provisions are no longer even the subject of discussion between the government and El Paso.

On January 22, 1965, each of the twenty pleadings in intervention referred to was denied (Casc. J.S. 10–11). In its memorandum opinion (*id.*, pp. 12–30), the district court ruled that none of the would-be intervenors was entitled to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. It pointed out that none of the intervenors had any "interest" in the divestiture proceedings that did not coincide with the public interest in this government antitrust litigation (Casc. J.S. 16–20)—an interest which was adequately protected by the

United States Attorney General who has sole statutory authority to conduct government antitrust litigation (Case. J.S. 21–23). The court stated (*id.* at pp. 13–14):

> The positions of these movants and applicants are in hopeless conflict; they reflect disputes among the would-be intervenors *inter se* respecting their conception of what will serve the "convenience and necessity" of the natural gas consumers they have undertaken to represent. The antitrust questions before the court are paramount to such matters.

The district court held that (*id.* at p. 20) no movant or applicant would be "bound" by the decree in such litigation within the meaning of Rule 24(a)(2), and (*id.* at pp. 23–26) none was so situated as to be adversely affected by the distribution of property within the meaning of Rule 24(a)(3) since none had a legal interest in the assets to be transferred in establishing the New Company. The court also refused (*id.* at pp. 26–27) to exercise its discretion under Rule 24(b) and allow permissive intervention, since no statute conferred a conditional right to intervene and the purpose of the intervenors was not to raise a claim or defense having a question of law or fact in common with the main action, but to inject into the proceedings issues of regulatory convenience and necessity which could only delay adjudication of the issues between the parties.

## ARGUMENT

This Court has repeatedly made clear how limited are the circumstances in which strangers are entitled

to intervene in government antitrust cases. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683; *Westinghouse Broadcasting Company* v. *United States*, 364 U.S. 518; *Wometco Television & Theatre Co.* v. *United States*, 355 U.S. 40; *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137. As one court recently stated (*United States* v. *ASCAP*, 341 F. 2d 1003, 1008 (C.A. 2): "The United States in instituting antitrust litigation seeks to vindicate the public interest and, in so doing, requires continuing control over the suit * * *" which "forecloses the possibility that a multitude of parties with conflicting interests will become entangled in [the] proceedings * * *." The decision of the district court in the present case fully accords with settled principles concerning the rights of outside parties to intervene in government antitrust proceedings. The court below correctly held that neither appellant was entitled to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure, and it clearly did not abuse its discretion in denying permissive intervention under Rule 24(b).

1. Each appellant claims the right to intervene (Casc. J.S. 7–8; Cal. J.S. 13–16) on the basis of Rule 24(a)(2), which authorizes intervention "when the representation of the applicant's interest by existing parties is or may be inadequate *and* the applicant is or may be bound by a judgment in the action" (emphasis added). Cascade, however, overlooks that both of these conjunctive elements must exist before a party is entitled to intervene under Rule 24(a)(2)

and alleges merely that it "will be 'bound' by the judgment of divestiture and is entitled to intervene as of right under Rule 24(a)(2) * * *" (Case, J.S. 8). Since it makes no claim that its "interest" is or may be inadequately represented by the government, it is for this reason alone not entitled to intervene as of right under Rule 24(a)(2). *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689.

In any event, it is clear that Cascade will not be "bound" by the final decree of divestiture within the sense of that term as used in Rule 24(a)(2). Its sole "interest" in the divestiture proceedings, as already indicated (*supra*, p. 2), is based on a "privity of contract with defendant under existing gas service agreements" (Case. J.S. 7) and its fear that the New Company may not be able to perform those contracts, which it will assume upon divestiture.* But the very purpose of the divestiture decree will be to restore the New Company to its previous position as a viable, independent pipeline company, capable of performing on a basis at least comparable to that existing before the merger. Cascade obtained all of its gas requirements from just such an independent entity (Pacific Northwest) before the merger and

* If the gas reserves allocated to the New Company under the decree should prove inadequate to permit it to serve existing customers, including Cascade, or if its operating proposal is otherwise deficient, it must be assumed that the Federal Power Commission will not issue a certificate of public convenience and necessity. In that event, El Paso would have to apply to the district court for modification of the decree in order to meet whatever requirements, not incompatible with the basic relief of total divestiture, may exist under the Natural Gas Act (see Statement, *supra*, pp. 4–6).

makes no complaint that the *status quo ante* was somehow inadequate. In short, it is clear that Cascade's private interest is no different from that of the public at large, which is to return the New Company to a position of corporate health and competitive vigor. As this Court held in the *Sam Fox* case (366 U.S., *supra*, at 689):

> We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it. * * *

The same reasoning applies to California's claim that it, too, will be "bound" by the final decree of divestiture. California admits that its interest in the decree is precisely the same as the government's.[4] It bases its claim of right to intervene under Rule 24(a)(2) primarily on the unsupported allegation that the government is not adequately representing the State's interest, which coincides with that of the government (Cal. J.S. 13–15). No claim of bad faith or malfeasance on the part of the government is made by California, and its argument amounts to little more than an assertion that it could represent the public interest better than can the United States (*cf.* Transcript, October 19, 1964, pp. 77–88). Answering similar im-

[4] Compare Cal. J.S. 7 ("California is interested in participating in the divestiture proceedings so as to insure that the successor New Company to Pacific Northwest will be a viable competitive corporation * * *"); Cal. J.S. 20–21 ("[The government] seeks to reconstruct Pacific Northwest * * * as a viable pipeline able to serve its markets and able to expand to serve other markets. * * *").

plications in the early case of *United States* v. *Northern Securities Co.*, 128 Fed. 808, 812 (S.D. Minn.), the court, in denying intervention in a proceeding as to antitrust relief, said:

> It [the United States] is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest * * *, so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise. * * *

See also *United States* v. *Bendix Home Appliances*, 10 F.R.D. 73, 76–77 (S.D.N.Y.); *United States* v. *ASCAP*, 11 F.R.D. 511, 513 (S.D.N.Y.); *United States* v. *Bearing Distributors Co.*, 18 F.R.D. 228 (W.D. Mo.).

Nor is the right of the State enlarged by its assertion that it is acting as *parens patriae* (Cal. J.S. 16–17). Contrary to California's contention (*id.* at p. 16), a State has no absolute right, outside the limits of Rule 24, to intervene in federal antitrust suits.[6]

[6] No such general rule was stated in *People of the State of California* v. *United States*, 180 F. 2d 596 (C.A. 9). The court held merely that in a suit by the United States to quiet title to certain streams in California emptying into interstate waterways, where the federal government in effect was claiming the invalidity of the state constitution and laws vesting ownership of such water in the state, the state was entitled to intervene "to defend those provisions of its Constitution and Laws" (180 F. 2d at 600). Compare 180 F. 2d at 606 (dissenting opinion).

*Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (C.A. 7), certiorari denied, 375 U.S. 834. Whatever rights it may have in local water or labor disputes within its borders (see Cal. J.S. 17), it is clear that California cannot intervene in the present federal antitrust case as a party plaintiff, as it seeks to do, in the absence of the consent of the Attorney General; for the present action was brought pursuant to the terms of Section 15 of the Clayton Act, which, like Section 4 of the Sherman Act, "explicitly require[s] that Government suits shall be under the direction of the Attorney General" (*United States* v. *Bendix Home Appliances*, 10 F.R.D. 73, 76–77 (S.D.N.Y.)). Neither a State nor a private party may maintain an action under these provisions. See *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48, 71; *Paine Lumber Co.* v. *Neal*, 244 U.S. 459, 471. If it were otherwise, a State could "assume prerogatives of the Attorney General" in an action "instituted by the Government for public protection" (*United States* v. *Bearing Distributors Co.*, 18 F.R.D., *supra*, at 231). It is clear that this is exactly what "special counsel" for California is trying to do in the present case and that the district court correctly denied intervention under Rule 24(a)(2).

2. Appellants also assert (Case. J.S. 3, 7–8; Cal. J.S. 11) a right to intervene under Rule 24(a)(3), which provides for intervention "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court." But the availability of this section has always

been limited to persons having "an interest [in the property to be disposed of] known and protected by the law: a claim of ownership, or a lesser interest, sufficient and of the type to be denominated a lien, equitable or legal" (4 Moore's *Federal Practice* ¶24.08 [2]). See also *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19.

California does not even claim to have a proprietary "interest" in the assets to be transferred to the New Company. Nor do California consumers of natural gas have any interest which would give the State standing to intervene in their behalf. *Commonwealth Edison Company* v. *Allis-Chalmers Mfg. Co.*, 315 F. 2d 564 (C.A. 7), certiorari denied, 375 U.S. 834; *New York City* v. *New York Telephone Co.*, 261 U.S. 312. The State's only real "interest," as it declares (Cal. J.S. 7), is "to insure that the successor New Company * * * will be a viable competitive corporation * * *."

Cascade claims an "interest" in the assets to be transferred on the ground that it is "in privity of contract with [El Paso] under existing gas service agreements" (Casc. J.S. 7), and fears that the New Company may not be able to meet its obligations under those agreements. Assuming *arguendo* that this contractual relationship gives Cascade a relevant "interest" in the assets, its contention must still fail for want of a sufficient showing that it will be adversely affected by the disposition of those assets. A similar claim under Rule 24(a)(3) was rejected in *Sutphen Estates, Inc.* v. *United States*, *supra*, 342 U.S. 19. There Warner Bros. Pictures, Inc. had been ordered to

divest itself of either its theater properties or its production and distribution assets. Sutphen Estates had entered into a long-term lease of theater properties with a subsidiary of Warner, and the parent had guaranteed the lease. Sutphen claimed that this guaranty, which was to be assumed by the new theater company, would be diluted since not supported by the full credit of the original Warner organization. In rejecting the claim that this "interest" was one which would be "adversely affected" by the divestiture and reorganization, the Court said (342 U.S. at 22):

> * * * No showing is made or attempted that the contingent liability under the guaranty is so imminent and onerous as to make the guaranty of the new company substantially less valuable than the guaranty of Warner's. For all we know, a guaranty of a company in the theater business, freed from the hazards of the production and distribution business, may be even more valuable than the guaranty of Warner's. * * *

Thus, an applicant under Rule 24(a)(3) must show that the alleged adverse effect of the disposition upon it is "imminent and onerous" rather than being merely "speculative and * * * contingent on unknown factors" (*id.* at 23). Here, however, the effect upon Cascade of the establishment of the New Company cannot be known since, unlike the situation in *Sutphen Estates,* no final plan has been approved. Further, since the purpose of the divestiture to be accomplished in this proceeding is to place the New Company in a viable, competitive position, any assertion that it will be unable to serve its customers must be based on sheer speculation and the assumption that

the Federal Power Commission will improperly discharge its statutory responsibilities and certificate a pipeline company which cannot meet the needs of the consuming public. See pp. 8–9, *supra*. In these circumstances, "appellant has not maintained the burden of showing that under Rule 24(a)(3) it may intervene as of right" (*id.* at p. 22).

3. It is equally clear that the district court did not abuse its discretion in determining that no grounds for permissive intervention existed here. See *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 524. Even assuming California* has met its burden of showing that its "claim" and the main action have "a question of law or fact in common" within the meaning of Rule 24(b)(2), we submit that the absence of the consent of the United States Attorney General is itself sufficient reason to deny intervention in this government antitrust suit. See pages 10–11, *supra*. Moreover here, as in *Sutphen Estates, supra*, "the claim of injury to appellant is too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene. The court had ample reason to prevent the [framing] of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere" (342 U.S. at 23). Thus, if California's consumers of natural gas are in fact aggrieved by an final decree of divestiture, the proper remedy lies with the Federal Power Commission in the proceeding which must be held before the

*Only California contends the district court committed error in denying permissive intervention under Rule 24(b).

New Company can operate a pipeline in interstate commerce.

## CONCLUSION

Neither appellant was entitled to intervene as of right in this government antitrust suit and the district court did not abuse its discretion in refusing to allow permissive intervention. The order denying intervention, therefore, is not appealable and the appeals should be dismissed. *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518; *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

WILLIAM H. ORRICK, JR.,
*Assistant Attorney General.*

LIONEL KESTENBAUM,
DONALD L. HARDISON,
*Attorneys.*

MAY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965